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2 UNITED STATES DISTRICT COURT  
3 DISTRICT OF NEVADA

4 \* \* \*

5 BRADLEY V. SMITH-OSTROUMOV,

6 Plaintiff,

7 v.

8 ANDRE LONG, CLARK COUNTY SCHOOL  
9 DISTRICT, *et al.*,

10 Defendants.  
11

Case No. 3:18-cv-582-MMD-CBC

**SCREENING ORDER**

12 On December 10, 2018, Plaintiff Bradley V. Smith-Ostroumov ("Smith-  
13 Ostroumov") filed an application to proceed *in forma pauperis* ("IFP") (ECF No. 2) and a  
14 *pro se* complaint (ECF Nos. 2-1 & 2-2). On February 25, 2019, Smith-Ostroumov filed a  
15 motion for leave to file an amended complaint and a first amended complaint. (ECF No.  
16 11.) The Court will grant the application to proceed *in forma pauperis* and deny the motion  
17 for leave to amend.

18 **I. IN FORMA PAUPERIS APPLICATION**

19 A person may be granted permission to proceed *in forma pauperis* ("IFP") if the  
20 person "submits an affidavit that includes a statement of all assets such [person]  
21 possesses [and] that the person is unable pay such fees or give security therefore. Such  
22 affidavit shall state the nature of the action, defense or appeal and affiant's belief that the  
23 person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122,  
24 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP,  
25 not just prisoner actions).

26 The Local Rules of Practice for the District of Nevada provide: "Any person who is  
27 unable to prepay the fees in a civil case may apply to the court for authority to proceed  
28 [IFP]. The application must be made on the form provided by the court and must include

1 a financial affidavit disclosing the applicant's income, assets, expenses, and liabilities."  
2 LSR 1-1.

3 "[T]he supporting affidavit [must] state the facts as to [the] affiant's poverty with  
4 some particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th  
5 Cir. 1981) (quotation marks and citation omitted). A litigant need not "be absolutely  
6 destitute to enjoy the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*,  
7 335 U.S. 331, 339 (1948).

8 A review of the application to proceed IFP reveals Smith-Ostroumov cannot pay  
9 the filing fee; therefore, the application is granted.

## 10 **II. SCREENING STANDARD**

11 Prior to ordering service on any defendant, the Court is required to screen an *in*  
12 *forma pauperis* complaint to determine whether dismissal is appropriate under certain  
13 circumstances. See *Lopez*, 203 F.3d at 1126 (noting the *in forma pauperis* statute at 28  
14 U.S.C. § 1915(e)(2) requires a district court to dismiss an *in forma pauperis* complaint for  
15 the enumerated reasons). Such screening is required before a litigation proceeding *in*  
16 *forma pauperis* may proceed to serve a pleading. *Glick v. Edwards*, 803 F.3d 505, 507  
17 (9th Cir. 2015).

18 "[T]he court shall dismiss the case at any time if the court determines that – (A) the  
19 allegations of poverty is untrue; or (B) the action or appeal – (i) is frivolous or malicious;  
20 (ii) fails to state a claim upon which relief may be granted; or (ii) seeks monetary relief  
21 against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(A), (B)(i)-  
22 (iii).

23 Dismissal of a complaint for failure to state a claim upon which relief may be  
24 granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. §  
25 1915€(2)(B)(ii) tracks that language. As such, when reviewing the adequacy of a  
26 complaint under this statute, the court applies the same standard as is applied under Rule  
27 12(b)(6). See, e.g., *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) ("The standard  
28 for determining whether a plaintiff has failed to state a claim upon which relief can be

1 granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of Civil Procedure  
2 12(b)(6) standard for failure to state a claim.”). Review under Rule 12(b)(6) is essentially  
3 a ruling on a question of law. See *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723  
4 (9th Cir. 2000) (citation omitted).

5 The Court must accept as true the allegations, construe the pleadings in the light  
6 most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v.*  
7 *McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints  
8 are “held to less stringent standards than formal pleadings drafted by lawyers[.]” *Hughes*  
9 *v. Rowe*, 449 U.S. 5, 9 (1980) (internal quotations marks and citation omitted).

10 A complaint must contain more than a “formulaic recitation of the elements of a  
11 cause of actions,” it must contain factual allegations sufficient to “raise a right to relief  
12 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).  
13 “The pleading must contain something more . . . than . . . a statement of facts that merely  
14 creates a suspicion [of] a legally cognizable right of action.” *Id.* (citation and quotation  
15 marks omitted). At a minimum, a plaintiff should include “enough facts to state a claim to  
16 relief that is plausible on its face.” *Id.* at 570; see also *Ashcroft v. Iqbal*, 556 U.S. 662,  
17 678 (2009).

18 A dismissal should not be without leave to amend unless it is clear from the face  
19 of the complaint the action is frivolous and could not be amended to state a federal claim,  
20 or the district court lacks subject matter jurisdiction over the action. See *Cato v. United*  
21 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th  
22 Cir. 1990).

### 23 **III. SCREENING**

24 Liberally construed, Smith-Ostroumov’s complaint alleges two causes of action.  
25 The first alleges a violation of Title VII of the Civil Rights Act, while the second alleges a  
26 violation of the Americans with Disabilities Act (“ADA”). (ECF Nos 2-1 & 2-2.)

27 According to the complaint, between 2011 and 2012, Smith-Ostroumov filed two  
28 complaints against “[his] Principal” and was subsequently retaliated against and forced to

1 retire. (ECF Nos. 2-1 & 2-2.) He recently learned his former principal is now the chief of  
2 human resources for the Clark County School District and is using that position to thwart  
3 Smith-Ostroumov's efforts at finding employment. (*Id.*) Specifically, in January 4, 2018,  
4 he applied for an administrative position with the school district and on January 17, 2018,  
5 he was informed he would not be considered for the position. (*Id.*) Smith-Ostroumov  
6 believes this is a direct result of Defendants providing "unfavorable references to [his]  
7 potential employers." (*Id.*)

8 A. Title VII of the Civil Rights Act

9 Smith-Ostroumov alleges Defendants retaliated against him for filing two Equal  
10 Employment Opportunity Commission ("EEOC") complaints in 2011 and 2012 against  
11 "[his] [p]rincipal" in violation of title VII of the Civil Rights Act of 1964. (ECF No. 2-2.)  
12 Title VII broadly prohibits employment discrimination on the basis of "race, color, religion,  
13 sex, or national origin." 42 U.S.C. § 2000e-2(a). Title VII's antiretaliation provision,  
14 designed to prevent an employer from deterring employees from exercising their rights,  
15 "prohibits an employer from 'discriminat[ing] against' an employee or job applicant  
16 because that individual 'opposed any practice' made unlawful under Title VII or 'made a  
17 charge, testified, assisted, or participate in' a Title VII proceeding or investigation."  
18 *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 56 (2006) (quoting 42 U.S.C. §  
19 2000e-3(a)).

20 To prevail on a Title VII retaliation claim, a plaintiff must establish a prima facie  
21 case showing: (1) he engaged in a protected activity; (2) he suffered an adverse  
22 employment decision; and, (3) there exists a causal link between the protected activity  
23 and the adverse employment decision. *Folkerson v. Circus Circus Enterprises, Inc.*, 107  
24 F.3d 754, 755 (9th Cir. 1997); *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir.  
25 1982). "Protected activity encompasses participation in enforcing one's rights under Title  
26 VII or opposition to an employer's discriminatory conduct under Title VII." *Arya v.*  
27 *CalPERS*, 943 F.Supp.2d 1062, 1071 (E.D. Cal. 2013); *Learned v. City of Bellevue*, 860  
28 F.2d 928, 932-33 (9th Cir. 1988). Filing a formal or informal complaint regarding

1 employment practices is a “protected activity,” however, “in order to constitute a protected  
2 activity, the plaintiff’s belief that the employer engaged in unlawful employment practices  
3 must be objectively reasonable.” *Luckey v. Visalia Unified Sch. Dist.*, No. 1:13-cv-00332-  
4 AWI-SAB, 2013 U.S. Dist. LEXIS 87170, 2013 WL 3166331, at \*3 (E.D. Cal. June 20,  
5 2013) (citing *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994) and *McCarthy v. Tobacco*  
6 *Co.*, 819 F. Supp. 2d 923, 932 (E.D. Cal. 2011)).

7 Additionally, to establish subject-matter jurisdiction over a Title VII claim, a plaintiff  
8 must exhaust his or her administrative remedies. *B.K.B. v. Maui Police Dep’t*, 276 F.3d  
9 1091, 1099 (9th Cir. 2002). “Under Title VII, a plaintiff must exhaust [his] administrative  
10 remedies by filing a timely charge with the EEOC, or the appropriate state agency, thereby  
11 affording the agency an opportunity to investigate the charge.” *Id.* at 1099 (citing § 2000e-  
12 5(b)). “The administrative charge requirement serves the important purposes of giving  
13 the charged party notice of the claim and narrowing the issues for prompt adjudication  
14 and decision.” *Id.* (citation and internal quotation marks omitted). “The scope of the  
15 EEOC complaint determines the permissible scope of the claims that may be presented  
16 in district court.” *Harshaw v. Lew*, No. 1:16-cv-00963-AWI-SKO, 2016 U.S. Dist. LEXIS  
17 93308, 2016 WL 3906913, at \*2 (E.D. Cal. July 18, 2016). The EEOC complaint must be  
18 filed within 180 days of the alleged unlawful employment practice, or, if the person initially  
19 instituted proceedings with the state or local administrative agency, within 300 days of the  
20 alleged unlawful employment practice. § 2000e-5(e)(1). If the EEOC does not bring suit  
21 based on the charge, the EEOC will issue a “right to sue letter.” § 2000e-5(f)(1). Once a  
22 person receives this letter, he has 90 days to file suit. *Id.*

23 Here, Smith-Ostroumov states a colorable claim under title VII of the Civil Rights  
24 Act. He filed two EEOC complaints in 2011 and 2012, and, in retaliation for those  
25 complaints, he was forced to retire in 2012. (ECF Nos. 2-1 & 2-2.) Additionally, he  
26 received unfavorable references from Defendants and was denied consideration for a  
27 Clark County School District position in 2018. (*Id.*) Therefore, Smith-Ostroumov may  
28 proceed on his title VII claim.

1           B.     American with Disabilities Act

2           Smith-Ostroumov alleges generally that Defendants violated the Americans with  
3   Disability Act (“ADA”). (ECF Nos. 2-1 & 2-2.) He fails to identify which portion of the ADA  
4   Defendants allegedly violated and likewise fails to identify specific facts to support the  
5   allegation. His allegations are conclusory and are so unclear that it is impossible to  
6   discern what actions were taken that violated the ADA.

7           Smith-Ostroumov’s allegations do not raise a right to relief above the speculative  
8   level, provide plausible grounds to suggest and infer the elements, or raise a reasonable  
9   expectation discover will reveal evidence of the required elements. Therefore, the Court  
10   concludes Smith-Ostroumov fails to state a colorable claim based on the ADA and  
11   dismisses this claim with leave to amend.

12       **IV.     Motion for Leave to Amend**

13           Prior to screening the original complaint, Smith-Ostroumov filed a motion for leave  
14   to amend his complaint. (ECF No. 11). As noted above, complaints brought by parties  
15   proceeding *in forma pauperis* must be screened. See 28 U.S.C. § 1915(e)(2); see also  
16   *Lopez*, 203 F.3d at 1129. Until a complaint is screened and deemed to state a claim, there  
17   is no complaint to amend. Therefore, Smith-Ostroumov’s motion to amend was  
18   procedurally improper and it is denied.

19           However, Plaintiff is granted leave to file an amended complaint to cure the  
20   deficiencies of the complaint as stated in this order. If Plaintiff chooses to file an amended  
21   complaint he is advised that an amended complaint supersedes (replaces) the original  
22   complaint and, thus, the amended complaint must be complete in itself. See *Hal Roach*  
23   *Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (holding  
24   that “[t]he fact that a party was named in the original complaint is irrelevant; an amended  
25   pleading supersedes the original”); see also *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928  
26   (9th Cir. 2012) (holding that for claims dismissed with prejudice, a plaintiff is not required  
27   to reallege such claims in a subsequent amended complaint to preserve them for appeal).  
28   Plaintiff’s amended complaint must contain all claims, defendants, and factual allegations

1 that Plaintiff wishes to pursue in this lawsuit. Moreover, Plaintiff should file the amended  
2 complaint with the Clerk and it must be entitled "First Amended Complaint."

3 **V. CONCLUSION**

4 For the foregoing reasons, **IT IS HEREBY ORDERED** that Plaintiff's application to  
5 proceed *in forma pauperis* (ECF No. 2) is **granted**. Additionally, Plaintiff's motion for  
6 leave to amend (ECF No. 11) is **denied**. Furthermore, the Court finds Plaintiff may  
7 **proceed** on his Title VII claims, however, his ADA claim is **dismissed with leave to**  
8 **amend**.

9 **IT IS FURTHER ORDERED** that the Clerk shall **FILE** the Complaint (ECF Nos. 2-  
10 1 & 2-2).

11 **IT IS FURTHER ORDERED** that the Motion for Leave to File an Amended  
12 Complaint (ECF No. 11) is **DENIED** as premature.

13 If Plaintiff chooses to file an amended complaint curing the deficiencies of his  
14 complaint, as outlined in this order, Plaintiff will file the amended complaint within 30 days  
15 from the date of entry of this order. If Plaintiff chooses to file an amended complaint, he  
16 shall entitle it "First Amended Complaint." If Plaintiff chooses to file an amended  
17 complaint, the Court will screen the amended complaint in a separate screening order.  
18 The screening process will take several months. If Plaintiff chooses not to file an amended  
19 complaint curing the stated deficiencies of the complaint, this action will proceed  
20 immediately on the Title VII claim only.

21 DATED THIS 3rd day of July 2019.

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23   
24 UNITED STATES MAGISTRATE JUDGE  
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